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Shawn D. Spitzer

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* SHAWN D. SPITZER

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Appeal 2008-0811  
Application 10/647,992  
Technology Center 3600

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Decided: April 16, 2008

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Before TERRY J. OWENS, HUBERT C. LORIN, and JOHN C. KERINS,  
*Administrative Patent Judges.*

KERINS, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Shawn D. Spitzer (Appellant) seeks our review under 35 U.S.C. § 134 of the non-final rejection<sup>1</sup> of Claims 1 and 3-5. We have jurisdiction under

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<sup>1</sup> The claims on appeal have been twice rejected. As such, we have jurisdiction to address the case on the merits. *Ex parte Lemoine*, 46 USPQ2d 1432 (Bd. Pat. App. & Int. 1995).

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35 U.S.C. § 6(b) (2002). Prior to this appeal, Claims 2 and 6-23 were canceled.

## SUMMARY OF DECISION

We REVERSE.

### THE INVENTION

Appellant's invention is a seating apparatus having a seat portion with an attached seat back portion, a top fitted over the seat back and a bottom fitted over the seat portion, with the top and bottom having complementary engagement assemblies that detachably engage the lower end of the top to the rearward end of the bottom. The top and bottom each support uniform adornment, and the uniform adornments of the top and bottom together form an identifying uniform of a member of an organization.

Claim 1, reproduced below, is representative of the subject matter on appeal:

1. Apparatus comprising:

a seat including a seat portion and an attached seat back portion;

a top, having a lower end, fitted over the seat back portion and a bottom, having a rearward end, fitted over the seat portion;

an engagement assembly carried by one of the lower end of the top and the rearward end of the bottom;

a complementary engagement assembly carried by  
the other of the lower end of the top and the  
rearward end of the bottom;

the engagement assembly detachably engaged to  
the complementary engagement assembly  
detachably engaging the lower end of the top to the  
rearward end of the bottom;

the top supporting first uniform adornment;

the bottom supporting second uniform adornment;

the first and second uniform adornments together  
forming the top and bottom as an identifying  
uniform of a member of an organization.

### THE REJECTION

The Examiner relies upon the following as evidence of  
unpatentability:

Takamatsu	US 4,036,524	July 19, 1977
Estes	US 4,694,511	September 22, 1987
Bolewski	US Des. 365,958	January 9, 1996

The following rejections are before us for review:

1. Claim 1 stands rejected under 35 U.S.C. § 103(a) as being  
unpatentable over the Takamatsu patent, in view of the Bolewski design  
patent.

2. Claims 3-5 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Takamatsu in view of Estes.

#### ISSUE

The issue before us is whether Appellant has shown that the Examiner erred in concluding that the subject matter of Claim 1 is obvious, and therefore unpatentable, over the Takamatsu and Bolewski references. In particular, we must determine if the Examiner has established that it would have been obvious, in view of Bolewski, to modify the Takamatsu seat apparatus to include a top and bottom supporting uniform adornment, such that the adornment on the top and bottom together form an identifying uniform.<sup>2</sup>

#### FINDINGS OF FACT

The following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. The term “uniform” has the commonly understood meaning that it is , “[A] distinctive outfit intended to identify those who wear it as members of a specific group.” *The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2006.*

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<sup>2</sup> Appellant does not argue that the limitations set forth in Claims 3-5 render those claims separately patentable from Claim 1, and thus the issue involved in the rejection of those claims is the same as it is with respect to Claim 1, even though the claims were rejected on different grounds.

2. The Bolewski design patent discloses a seat cover for an automobile seat on which indicia are presented connoting the sports of football, baseball, basketball, and hockey. (Bolewski, Figs. 1-7).

3. The names of sports, to wit, “football”, “baseball”, “basketball”, and “hockey” are not synonymous with organizations such as the NFL, MLB, NBA and NHL, which organize and promote leagues which play these sports.

### PRINCIPLES OF LAW

Section 103 forbids issuance of a patent when the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 (*Graham* factors continue to define the inquiry that controls).

In *KSR*, the Supreme Court emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” *id.* at 1739, and discussed circumstances in which a patent might be

determined to be obvious. In particular, the Supreme Court emphasized that “the principles laid down in *Graham* reaffirmed the ‘functional approach’ of *Hotchkiss*, 11 How. 248.” *KSR*, 127 S.Ct. at 1739 (*citing Graham*, 383 U.S. at 12), and reaffirmed principles based on its precedent that, “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.*

Printed matter may well constitute structural limitations upon which patentability can be predicated. *In re Royka*, 490 F.2d 981 (CCPA 1974). The critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate. *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983). While printed matter must always be considered, in cases in which the printed matter is not functionally related to the substrate, it may not be entitled to patentable weight. *Id.* at 1386.

## ANALYSIS

### *Obviousness rejection of Claim 1*

The sole issue joined between the Examiner and Appellant is whether the combined teachings of the Takamatsu and Bolewski patents render obvious the element in the claimed invention directed to, “the first and second uniform adornments together forming the top and bottom [which support the first and second uniform adornments] as an identifying uniform of a member of an organization.” (Appeal Br., Claims Appendix).

Appellant takes the position that Bolewski teaches a seat cover adorned with indicia or graphics identifying, generically, a plurality of types of sports, and that a person of ordinary skill in the art would not find it obvious from that teaching to have the top and bottom formed as a uniform. (Appeal Br. 12-15). The Examiner, in contrast, asserts that those sports illustrated on the Bolewski seat cover are forms of organizations (*e.g.*, NFL for football, etc.), and, alternatively, that other organizations such as youth sports leagues, use more generic uniforms such as are shown in Bolewski. These assertions lead the Examiner to conclude that the Bolewski graphics are uniforms, or would suggest to persons skilled in the art that the seat covers could be made to appear as uniforms. (Answer 4).

We are persuaded that Appellant has the better argument here, and that the rejection of Claim 1 is in error. As a starting point, we look to the meaning of the term “uniform” as defined by Appellant. The Specification evidences that the term “uniform” is intended to mean, “an identifying outfit or style of dress worn by members of a given group”.<sup>3</sup> (Specification, p. 1, ll. 12-13; p. 10, ll. 4-6). As such, the uniform adornment required to be supported on the claimed top and bottom of the seat apparatus must necessarily be of such substance and detail that the identifying uniform

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<sup>3</sup> This is generally consistent with the commonly understood definition supplied in dictionaries, for example, “uniform” is defined as, “[A] distinctive outfit intended to identify those who wear it as members of a specific group.” *The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2006.* (Finding of Fact 1).



formed by the top and bottom would reasonably accurately replicate an actual uniform of an identifiable organization. The term “uniform” as used by Appellant would not cover, for example, the mere placement of numerical indicia on a fabric of a particular color, unless, of course, it could be shown that such adornment replicates an actual uniform worn by members of a particular organization.

The Examiner makes us aware that the term may be quite broadly applied relative to the types of groups or organizations to which this invention could be directed. While we appreciate the possible breadth of the claim in terms of the potential markets for the claimed invention, we are not persuaded, as noted above, that the term “uniform” itself is so broad that it encompasses or is rendered obvious by the subject matter illustrated in the Bolewski patent. Further, we do not believe that Bolewski would suggest to persons of ordinary skill in the art that the seat covers could be made such that the top and bottom portions operate together to replicate a recognizable uniform of a particular organization.

The Examiner’s contention that “football, baseball, basketball and hockey [the sports depicted on the Bolewski seat cover (Finding of Fact 2)] are forms of organizations” is misplaced. The NFL, MLB, NHL and NBA are prominent organizations which organize and promote these respective sports, but the sports themselves are not forms of organizations, as asserted. (Finding of Fact 3). Moreover, even if we accepted that the generic sports would be regarded as organizations, the Bolewski seat cover would not form

the top and bottom portions as *an* identifying uniform, but rather would be seen as displaying seemingly random portions of four different uniforms.

The Examiner further contends that, “it is a matter of design choice as to what the user prefers to put on the cover”, and that the choice is not critical or significant to the patentability of the invention. (Answer 4-5). As a result, the Examiner advises that, “[T]he patentability is not directed to the design, but the utility” of the seat cover apparatus. While this might be the case were Appellant claiming, for example, the mere placement of a logo or other organization-related indicia on a seat cover, without more, here, the claim requires that the top and bottom both have uniform adornments supported thereon, and that the top and bottom are formed as an identifying uniform once positioned on the seat and seat back, and once engaged to one another.

The Examiner’s position also runs contrary to the guidance handed down by our reviewing court and its predecessor in so-called “printed matter” cases. The CCPA on several occasions advised that printed matter may well constitute structural limitations upon which patentability can be predicated. *In re Royka*, 490 F.2d 981 (CCPA 1974)(citing *In re Jones*, 373 F.2d 1007 (CCPA 1977) and *In re Miller*, 418 F.2d 1392 (CCPA 1969)). The Court of Appeals for the Federal Circuit remains faithful to this precept, noting that printed matter must be considered, although in cases in which the printed matter is not functionally related to the substrate, it may not be entitled to patentable weight. *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir.

1983). The Court in the *Gulack* case reaffirmed the guidance in the earlier *Miller* case, to the effect that, “the critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate.” *Id.* at 1386.

We do not discern any evidence or reasoning advanced by the Examiner that tends to establish that the uniform adornment on the top and bottom are not functionally related to the material making up the top and bottom. The Examiner erroneously proceeds directly to the conclusion that the adornment is not to be given patentable weight. Moreover, we find that the uniform adornment does have a functional relationship with the top and bottom, which is stated directly in Claim 1. Uniform adornment is placed on or supported by the top and bottom in such a manner that, when the top and bottom are positioned on the seat back and seat portion, they and their attendant uniform adornments replicate a uniform that would be worn by members of an organization. As we concluded above, this is unobvious in light of the prior art of record.

We will, accordingly, reverse the rejection of Claim 1 under 35 U.S.C. § 103(a).

*Obviousness rejection of Claims 3-5*

Appellant contends that these claims are patentable for the same reasons as are presented with respect to Claim 1. The Examiner cites to the *Estes* patent as evidence that it was known in the art to provide a neck

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opening and sleeves on a device that can be attached to a seat to operate as a seat cover. The Estes patent does not, in our view, overcome the basic deficiency of the Takamatsu and Bolewski patents, which fail to render obvious a top and bottom that, when positioned on a seat back and seat, and when fastened together, replicate a uniform.

The rejection of Claims 3-5 under 35 U.S.C. § 103(a) will be reversed.

#### CONCLUSIONS OF LAW

We conclude that Appellant has established that reversible error exists in the rejection of Claims 1 and 3-5 under 35 U.S.C. §103(a).

#### DECISION

The decision of the Examiner to reject Claims 1 and 3-5 is  
REVERSED.

REVERSED

vsh

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